

No. 12,927.

IN THE

**United States Court of Appeals
FOR THE NINTH CIRCUIT**

RKO RADIO PICTURES, INC., a corporation,

Appellant,

vs.

ANN SHERIDAN,

Appellee,

and

ANN SHERIDAN,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

RKO Radio Pictures, Inc., hereby respectfully petitions for a rehearing of both of the above entitled appeals.

I.

This court observes in its opinion "if RKO rightfully terminated under some other section of the contract, it was not liable at all." *But* the court fails to consider RKO's contention (*e. g.*, Op. Br., RKO Appeal, pp. 27, 42-3) that it did terminate the contract for breach—*i. e.*, Sheridan's failure to use good faith in considering suggested leading men; and the admitted fact that the trial court instructed the jury (in effect) that Sheridan was nevertheless entitled to recover "minimum" compensation if she had performed any services at all [Inst. P, R. 595.]

In other words, this court states that a certain factual situation would be a complete defense to RKO; but it does not even mention the fact that the trial court instructed the jury that it should give its verdict to Miss Sheridan irrespective of whether or not such fact existed.

This court's failure to consider this basic point is one basis for our petition for rehearing.

In addition, the court makes two vital statements of fact, upon which it places great reliance, which are not only not supported by, but are in direct conflict with, the record.

II.

In considering (on RKO's appeal) the meaning of the last sentence of Paragraph 29 of the contract (which is found to be ambiguous), this court invokes the well-established rule of construction to the effect that ambiguous language should be construed against the party who prepared that language.

The court (Opinion pp. 3-4) assumes that the language in question was prepared by RKO.

We will show that this assumption is without support in the record.

We will also show that on the basis of the statements of counsel in the briefs, and particularly on the basis of Miss Sheridan's offer of proof—which her counsel have invited this court to consider in determining the authorship of Paragraph 29—it appears without dispute that the language in question was prepared by Miss Sheridan's counsel in its entirety.

This misconception of the facts is a second basis for our petition for rehearing.

III.

RKO (and the trial court) thought that the term "minimum compensation" in Paragraph 29 unambiguously meant \$50,000 under the circumstances here presented.

Miss Sheridan, on the other hand, thought it meant \$150,000.

This court observes that "wherever the \$50,000 figure appears in the contract, it is designated not as 'minimum compensation' but as 'flat compensation.'" The reason for the difference in terms is difficult to discover, if it was intended that "minimum compensation was \$50,000"; and accordingly holds the contract ambiguous.

The argument is compelling. We agree that if the draftsman meant the same amount that had already been defined as "flat compensation," he would hardly have changed his terminology and referred to "minimum compensation." Indeed, we so argued in our brief (Cross-Appellee's Reply Br. p. 29).

The error in the court's argument is that it has erroneously read the record.

The contract, Exhibit 1, clearly and expressly provides:

" . . . said One Hundred Fifty Thousand Dollars (\$150,000.00) being hereinafter called the flat compensation . . ." (App. Op. Br., Appendix p. 3; Cross-App. Op. Br., Appendix p. 3.)

Again, the logic of the court is unimpeachable; but it is applied to a mistaken view of the facts.

When applied to the true facts, the argument adopted by the court is strongly persuasive (if not, indeed, conclusive) of the correctness of the decision of the trial court on this phase of the case.

This factual error of the court is another basis for our petition for rehearing.

Brief Restatement of Facts.

Sheridan and RKO entered into a written contract under which she was employed as leading actress for a certain motion picture at a "flat compensation" of \$150,000 *plus* a percentage of the profits. Fifty thousand dollars was payable on account of the "flat compensation" on the first payday after photography commenced. The remaining \$100,000 of the flat compensation was deferred and payable *only* from receipts of the picture.

Sheridan was not required to render any services under the contract unless and until she should approve "the actor who will portray the leading male role" in the picture.

Concurrently with the execution of the employment agreement she signed a writing approving Mr. Robert Young as such actor; but expressly reciting that RKO was not required to assign him to the picture.

Mr. Young in fact rejected the role.

Discussions followed between RKO and Miss Sheridan with respect to a substitute actor. During this period Miss Sheridan also reported at the studio for consultations as to hair styling and costumes, as well as costume fittings. All of such activity took place after Mr. Young had rejected the role.¹

¹The meetings are listed by Miss Sheridan in her "Brief of Appellee Ann Sheridan," pages 6-7. In her testimony, she dated one of the meetings as July 5th to 7th [R. 91]—which would be several days before Young's rejection. However, at that meeting she was told that Mr. Young had rejected the role; so that it is apparent that she made a slight error in the date [R. 93].

RKO suggested several actors—including Mel Ferrer, Robert Ryan, Richard Basehart, and Van Heflin—but Miss Sheridan refused them all [R. 123-4].

It was and is a contention of RKO that there was an implied covenant on the part of Miss Sheridan to exercise her right of disapproval in good faith [and the Trial Court agreed; Inst. K, R. 593]; and that she did not do so. [The Trial Court found sufficient evidence on the subject to require it to submit the question of Miss Sheridan's bad faith to the jury in Inst. P, R. 595; but the jury did not pass on the question, since it was told by Inst. J-1, R. 592, that it need not do so if she had rendered any services pursuant to the contract.]

No agreement on a leading man having been reached, RKO terminated the employment agreement on August 17, 1949.

The jury awarded Miss Sheridan a verdict of \$50,000. RKO appealed, contending that it was not liable at all. Miss Sheridan appealed, claiming that she was entitled to more than \$50,000.

RKO's appeal involves a construction of the last sentence of Paragraph 29 of the contract:

“However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder.”

Miss Sheridan's appeal involves a construction of the first sentence of Paragraph 29 of the contract, under which (it has been held by the trial court and by this

court) the liability of RKO is limited to the payment of "minimum compensation payable to the Artist hereunder."

The trial court upheld RKO's contention that "minimum compensation," in the circumstances here presented, meant \$50,000; Miss Sheridan contends that it meant \$150,000; and this court found the provision ambiguous, requiring the taking of additional evidence.

RKO's Contentions.

RKO's appeal presented two points:

1. RKO was excused from any payment because of Miss Sheridan's breach of her obligation to use good faith in the approval or disapproval of a leading man;
2. RKO was excused from any payment by the provisions of the last sentence of Paragraph 29.

It asks a rehearing on both points:

1. This court *failed to consider* RKO's first point, although the language of the court indicates that the point is well taken.
2. This court erroneously construed the last sentence of Paragraph 29, being led to its erroneous construction by a *misapprehension of the facts*.

RKO's contention on Miss Sheridan's appeal was that the term "minimum compensation" unambiguously meant \$50,000.

On its petition for rehearing, it contends:

3. This court erroneously rejected RKO's construction, being led to its erroneous conclusion by a *misapprehension of the facts*.

ARGUMENT.

I.

RKO Was Not Liable for Any Payment if Miss Sheridan Did Not Act in Good Faith in Disapproving Suggested Leading Men; and Was Entitled to (but Was Refused) a Jury Ruling on That Question.

This court has failed to rule on this contention.

Under the court's Instruction H-1 [R. 592], once Miss Sheridan appeared at the studio for costume fittings she became entitled to \$50,000.

She could then sit back, arbitrarily refuse to approve any actor submitted, and collect her "minimum compensation." RKO could do nothing to get the picture it had bargained for.

This is, we think, a highly shocking result; it is, we contend, precisely what happened; and the question is not explicitly discussed in this court's opinion.

We urged in our Opening Brief (pp. 42-3) that the court erred in instructing the jury that it could award minimum compensation despite Miss Sheridan's failure to act in good faith on submitted names; and in failing to instruct that if she did not act in good faith, RKO was not liable.

The law and the facts both seem clear.

It seems to be conceded that there were implied covenants of good faith: RKO must submit prospective leading men in good faith; Miss Sheridan must exhibit like good faith in refusing them. The court so instructed the jury, without objection [Inst. K, R. 593].

It seems elementary that if Miss Sheridan were guilty of a breach of contract which prevented RKO from getting the picture for which it contracted, she should recover nothing.

This seems to be the view of this court when it observes (Opinion p. 5) "Thus, if RKO rightfully terminated under some other section of the contract, it was not liable at all."

Whether Miss Sheridan did in fact act in bad faith was of course a point of dispute below. That the trial court thought there was enough evidence of bad faith to submit to the jury is demonstrated by its giving of Instruction P [R. 595].

In that instruction, the jury was told that if it found that Miss Sheridan acted in bad faith, she could not recover *unless she was entitled to minimum compensation under Instruction H-1.*

However, under Instructions J-1 and H-1 [R. 592], the jury was instructed not to consider the question of good faith if Miss Sheridan rendered any services pursuant to the contract.

We submit that these qualifications were erroneous—that if Miss Sheridan acted in bad faith in refusing to approve a leading man she could not recover \$50,000 for attending on costume fittings in anticipation of the selection of a leading man.

We submit that we were entitled to a finding of the jury on this issue; and that we are entitled to a rehearing to have this court pass on this fundamental issue.

II.

Services Are Not Rendered "Pursuant to" the Contract if the Contract Imposed No Obligation to Render Them.

This court's construction to the contrary is based upon a misconception of the facts.

We do not here renew our argument (on which this court thought it unnecessary to pass) that Miss Sheridan never became "obligated to render any services pursuant to the contract."

It is entirely clear that after Mr. Young declined the role, with no one assigned with Miss Sheridan's approval to perform that part, she was not *then* obligated to perform any services.

And it was only after Mr. Young's refusal of this part that she claims to have rendered any services.

Were those services rendered "pursuant to" the contract?

Certainly not in the ordinary acceptation of those words.

Webster says "Pursuant: Acting or done in consequence of or in prosecution (of any thing)."

The services rendered by Miss Sheridan were clearly not "in consequence of" the contract—they were voluntarily rendered in anticipation of later agreement.

This court, however, refuses to construe the words as meaning "services under the contract under obligation"² (Opinion p. 3).

²The court observes that the jury found that services "under the contract" were rendered. But they did so under an instruction [H-1, R. 592] that Miss Sheridan had become bound under the contract.

In thus refusing to accept the plain meaning of the words, the court relies on the rule of law that any ambiguity must be resolved against the party creating it.

The rule is, of course, sound.

But it is in fact applied against the wrong party.

A. THE LANGUAGE IN QUESTION WAS PREPARED BY
MISS SHERIDAN'S COUNSEL.

The court will recall that Polan Banks Production, Inc., originally intended to produce the picture, and negotiated an employment contract with Miss Sheridan to that end. Thereafter, the original plans were changed, and RKO took over from Polan Banks what has been called the "package" (Sheridan Op. Br. p. 4), including the agreement to employ Miss Sheridan on the terms that had been negotiated.

When Miss Sheridan's counsel, on her appeal (Sheridan Op. Br. pp. 10, 15 *et passim*) asserted that the contract was prepared by RKO, we protested that the record did not so show (RKO Reply Br. pp. 3-4); and asked leave to state the facts in that connection.

Miss Sheridan's counsel apparently do not question the accuracy of our statement (Cross-Appellant's Reply Br. p. 3, footnote 2); but they assert that the facts are available in the record through Miss Sheridan's offer of proof.

We gladly accept their concession that we may look to the offer of proof for the determination of the question of the authorship of Paragraph 29.

It appears that Mr. Loyd Wright, acting as attorney for Miss Sheridan, prepared the first draft contract between Miss Sheridan and Polan Banks.

When RKO took over the "package," it also took over the employment agreement that had been negotiated.

However, certain changes in form were necessary, since RKO would now be both Producer and Distributor; and there would accordingly be no Distribution contract which would be referred to to measure the profits under which Miss Sheridan was to participate.

The legal department of RKO accordingly took the Banks agreement, and made pencilled notations of the essential changes.

The draft so marked was offered in evidence by Miss Sheridan and is Exhibit 5 for identification.

It will be observed that Paragraph 29 was included in the draft agreement submitted to RKO in the identical form in which it appears in the final employment agreement except that RKO inserted the words "or to complete the production of 'Carriage Entrance'" in the first sentence of the paragraph.

In other words, any ambiguity that exists was in the language of the agreement which RKO took over from Polan Banks, and which was prepared by Miss Sheridan's attorney.

III.

The Words “Minimum Compensation” Unambiguously Mean \$50,000 Under the Facts Here Appearing.

The term “minimum compensation” does not, on its face, appear difficult of construction.

“Minimum” says Webster, “The least possible amount assignable, admissible, possible, etc., in a given case.”

In this case, the least compensation payable to Miss Sheridan was clearly \$50,000.

The minimum could not possibly be more than \$50,000—for it is entirely clear that if the picture were made and released and never recovered its cost of manufacture, \$50,000 would be all she could get.

The court suggests that under some circumstances she might get less than \$50,000.

Of course, if she were guilty of a breach of contract, she would get nothing—but that is clearly not the situation we are considering.

Equally, if she failed to render her required services by reason of death or disability before she had served for five weeks, she might get less than \$50,000—but Miss Sheridan herself supplies the conclusive answer to that contention (Cross-Appellant’s Reply Br. p. 18, note 9): “Sheridan was not ill nor lawfully suspended, so that RKO would not be entitled to a reduction.”

We do not, in other words, here argue what would be the proper construction of the contract to pay “minimum compensation” if Miss Sheridan had so become ill: although we suggest that the specific illness clause would make unnecessary any reference to Paragraph 29.

But \$50,000 is the smallest amount Miss Sheridan could recover if—as here—she performed all services she was lawfully called upon to perform.

The court, however, suggests that:

“Wherever the \$50,000 figure appears in the contract, it is designated not as ‘minimum compensation,’ but as ‘flat compensation.’ The reason for the difference in terms is difficult to discover, if it was intended that ‘minimum compensation’ was \$50,000.”

We are inclined to agree that such change of language—if it in fact existed—would create an ambiguity.

But the fact is that \$50,000 is *never* referred to as “flat compensation.”

“Flat compensation,” wherever that term is used in the contract, means [by express definition: Ex. 1, Par. 6: Op. Br. p. 3] \$150,000.

We submit that the argument of the court demonstrates the correctness of the ruling of the trial court on this point.

It has never been contended by anyone that “minimum compensation” means anything other than either (a) \$50,000 or (b) \$150,000.³

But, as we argued in our Cross-Appellee’s Reply Brief, page 29, the fact that the draftsman changed his language from “flat compensation” to “minimum compensation” is all but conclusive evidence that \$150,000 was not intended.

When that argument is coupled with the fact that \$150,000 is obviously not a “minimum,” we submit that the trial court was correct in its holding.

³Perhaps adjusted by reason of illness or other facts not here appearing: Cross-Appellant’s Reply Brief, p. 18.

IV.

None of the Proffered Parol Evidence Was Admissible.

We urged that all of the offered parol evidence was admissible.

This court observes that "certain portions of the evidence offered were very relevant in determining the meaning of the phrase."

Such a ruling, of course, offers no guidance to us or the court if a retrial is had.

We sincerely assert that a careful reexamination of the offer of proof discloses nothing which, in our opinion, is admissible.

The offer is to show, first that the original deal was negotiated between Miss Sheridan and Polan Banks [R. 106]—a fact that was stipulated.

Second, that Miss Sheridan's attorney wrote a letter—setting up the skeleton of the employment [R. 106]. However, the letter (a) does not mention this point; and (b) does not appear to have been brought to RKO's attention.

Third, "that it was the intention of plaintiff and Mr. Banks . . . that plaintiff was to receive minimum compensation of \$150,000"—an intention which does not appear to have been disclosed to RKO.

Fourth, that neither plaintiff nor Polan Banks meant \$50,000 by the term "minimum compensation"—again, not communicated to RKO.

Fifth, "That there was no discussion between plaintiff and defendant with reference to the meaning of the phrase 'minimum compensation' when plaintiff and defendant executed and delivered the contract of April 29, 1949" [R. 108].

Sixth, that the budget included \$150,000 for Miss Sheridan's compensation.

Seventh, that RKO and its officers understood that plaintiff was to receive compensation of \$150,000—which, of course, must mean in accordance with the contract.

Eighth: Draft of the Polan Banks employment contract with Miss Sheridan; with no change with respect to this portion of Paragraph 29, nor with respect to the provision of a "*flat compensation*" of \$150,000 with \$50,000 payable in cash and \$100,000 deferred.

Ninth: Draft of Polan Banks' employment contract with Miss Sheridan, with RKO's pencilled changes—including no changes in the portion here under consideration.

Tenth: Custom and usage in the motion picture industry [R. 110].

We submit that secret intention of other parties, not disclosed to RKO, are not admissible against it—particularly since it is admitted that in the offer that the subject was not discussed between Miss Sheridan and RKO.

And the authorities in our Cross-Appellee's Reply Brief, page 34, conclusively show that custom and usage are not admissible unless pleaded.

Conclusion.

The opinion of this court fails to consider one of RKO's basic defenses—Miss Sheridan's breach of her obligation of good faith—nor the failure of the trial court to submit it to the jury.

Moreover, the court, in construing the contract, on each of the separate appeals falls into a clear error of fact, and indeed on Miss Sheridan's appeal has misread the words of the contract it is attempting to construe.

We submit that a rehearing should be granted; that the trial court's construction of the words "minimum compensation" should be upheld; but that the judgment should be reversed with instructions to submit RKO's defenses, referred to in its appeal, to the jury under proper instructions.

Respectfully submitted,

MITCHELL, SILBERBERG & KNUPP,

By GUY KNUPP,

Attorneys for Petitioner.

Certificate of Counsel.

I, Guy Knupp, do hereby certify that I am one of the counsel for the petitioner RKO Radio Pictures, Inc., and that the foregoing petition for rehearing is in my judgment well founded and is not interposed for delay.

GUY KNUPP.